Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Salsgiver Communications, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	**File No. EB-06-MD-004**
	)	
North Pittsburgh Telephone Company,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 2007 **Released: November 26, 2007**

By the Enforcement Bureau:

1. In this Order, we grant in part a pole attachment complaint[1] filed by Salsgiver Communications, Inc. ("Salsgiver") against North Pittsburgh Telephone Company ("NPTC") pursuant to section 224 of the Communications Act of 1934, as amended ("Act").[2] We hold that section 224 and the Commission's pole attachment rules[3] require NPTC to allow Salsgiver access to NPTC's poles in Buffalo Township, the Borough of Freeport, and Harrison Township, Pennsylvania. We also find that several terms in the NPTC-Salsgiver pole attachment agreement violate section 224 and the Commission's rules. We therefore order NPTC to amend the parties' pole attachment agreement to eliminate those terms that we have found unlawful, and to process promptly Salsgiver's attachment applications.

I. BACKGROUND

2. Salsgiver describes itself as "a cable television operator, and a provider of competitive communications services, including broadband services."[4] NPTC is an incumbent local exchange carrier in Pennsylvania,[5] and is a "utility" within the meaning of section 224(a)(1) of the Act.[6] As a utility, NPTC must give "cable television systems" nondiscriminatory access to attach their facilities to any poles

[1] Complaint, File No. EB-06-MD-004 (filed Mar. 20, 2006) ("Complaint").

[2] 47 U.S.C. § 224.

[3] *See* 47 C.F.R. §§ 1.1401–1.1418.

[4] Complaint at 2. As discussed below, NPTC challenges that characterization of Salsgiver's status.

[5] Complaint at 2; NPTC Response, File No. EB-06-MD-004 (filed Apr. 24, 2006) ("Response") at 4.

[6] Complaint at 2; Response at 4. Section 224(a)(1) of the Act defines "utility" as including "a local exchange carrier … who owns or controls poles, ducts, conduits, or rights-of-way use, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

that it controls.[7]

3. Salsgiver has been seeking to attach its facilities to NPTC's poles since 2004.[8] In its initial request, Salsgiver indicated that it sought attachment for "wiring and equipment necessary to provide data communications services."[9] NPTC denied the request on the grounds that, as a provider of only data communications services, Salsgiver did not qualify for mandatory access under section 224.[10] After much negotiation, during which Salsgiver asserted that it was eligible for access as a cable television system,[11] NPTC eventually sent Salsgiver a proposed pole attachment agreement.[12] Salsgiver signed the Agreement in September 2005, and then sent NPTC payment and an application requesting access to specific poles.[13]

4. Salsgiver has never attached its facilities to NPTC's poles, however.[14] In February 2006, NPTC again raised the issue whether Salsgiver was entitled to access as a cable television system, in light of the fact that Salsgiver had not yet installed a cable "headend."[15] NPTC asserted that the Pole Attachment Agreement required Salsgiver to identify the location of its headend, and that a headend "is necessary for Salsgiver Communications to be considered a cable television system" entitled to pole access under the Act.[16] NPTC returned Salsgiver's application and payment, indicating that Salsgiver could resubmit them if and when its headend was complete.[17] Salsgiver then filed its Complaint.[18]

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[7] 47 U.S.C. § 224(f)(1) ("A utility shall provide a cable television system … with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.") For purposes of this Order, we consider "cable television system" under section 224(f)(1) of the Act to be synonymous with "cable operator" under section 602(5) of the Act, 47 U.S.C. § 522(5), and we use these terms interchangeably.

[8] *See, e.g.*, Complaint at 2; Response at 5.

[9] Complaint, Exh. 2.

[10] Complaint at 2, Exhs. 3 & 4; Response at 5.

[11] Complaint, Exhs. 5-7.

[12] Complaint at 7, Exh. 8 ("Pole Attachment Agreement" or "Agreement").

[13] Complaint at 7, Exhs. 8 & 9.

[14] Complaint at 9.

[15] The Agreement defines a headend as "[t]he control center of a cable TV system, whose primary function is to receive via antenna, filter, amplify and process local, TV broadcast signals and to receive, decrypt, and modulate satellite-delivered video programming for distribution from the headend over cable, fiber or wire to, and receipt by, cable television subscribers as discrete channels." Complaint, Exh. 8, at § 1.5.

[16] Complaint, Exh. 14.

[17] Complaint, Exhs. 14-15.

[18] The Complaint initially requested that the Commission grant "extraordinary relief" in the form of penalties and sanctions. Complaint at 40-42, ¶¶ 166-169. *See* Reply, File No. EB-06-MD-004 (filed May 23, 2006) ("Reply") at 26-28. On May 24, 2007, however, Salsgiver filed a Notice that it was "withdrawing its request for extraordinary relief, penalties, forfeitures, sanctions, and damages." Notice, File No. EB-06-MD-004 (filed May 24, 2007). Accordingly, we are not ruling on the initial request.

II. DISCUSSION

A. Salsgiver Is Entitled to Access to NPTC's Poles in Areas Where It Has a Local Franchise Agreement.

5. Under section 224(f)(1) of the Act, operators of "cable television systems" are entitled to nondiscriminatory access to utility poles.[19] In a complaint proceeding, if a cable operator establishes a *prima facie* case that it is entitled to such access, the utility has the burden of proving that its denial of access is lawful.[20] As explained below, we find that, by presenting evidence of its local franchise agreements, Salsgiver has established a *prima facie* case that it is entitled to pole access as a cable operator. We also find that NPTC has not rebutted Salsgiver's *prima facie* case. We therefore hold that Salsgiver is entitled to access to NPTC's poles in the areas covered by the franchise agreements.

6. The dispute in this case centers on whether Salsgiver actually intends to provide cable television services -- which would make it eligible for mandatory access to NPTC's poles -- or only services ineligible for mandatory access, such as information services. As evidence that it is a cable operator, Salsgiver provides copies of an FCC Cable Community Registration Form 322 for the Borough of Freeport,[21] and cable franchise agreements with Buffalo Township, the Borough of Freeport, and Harrison Township, Pennsylvania.[22] Salsgiver also provides the declaration of its Chief Executive Officer, Loren Salsgiver, stating that the company has entered into programming agreements with video content providers, and purchased some of the equipment it will need to construct a cable headend.[23]

7. The FCC Registration Form is not sufficient to establish a *prima facie* case that Salsgiver is a cable operator. It does not represent an authorization to operate a cable television system, or an FCC determination that Salsgiver operates a cable television system.[24] It is merely a necessary, but not sufficient, prerequisite to providing cable service. We also find the declarations about equipment and programming agreements insufficient in themselves to make a *prima facie* case. These declarations fail to identify any particular equipment or programming suppliers.

8. We do, however, find Salsgiver's showing that it has cable franchise agreements with a number of municipalities sufficient to create a *prima facie* case that it is entitled to pole access as a "cable television system" within the meaning of section 224(f)(1) of the Act. These franchise grants demonstrate that the municipalities involved expect Salsgiver to operate a cable television system. For instance, the Harrison Township franchise requires Salsgiver, within three years, to construct "an all-digital video system capable of offering not less than one hundred seventy-eight (178) channels of programming and high speed internet service."[25] Moreover, in three other recent cases involving NPTC, we found that

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[19] 47 U.S.C. § 224(f)(1).

[20] 47 C.F.R. § 1.1409(b).

[21] Complaint, Exh. 1. FCC Form 322 is a registration statement filed pursuant to 47 C.F.R. § 76.1801.

[22] Reply in Support of Motion to Expedite and Bifurcate, File No. EB-06-MD-004 (filed April 12, 2006) ("Reply in Support of Motion"), Exhs. 1-3.

[23] Reply, Declaration of Loren Salsgiver ("Salsgiver Declaration") at 3. *See* Reply in Support of Motion at 5-7.

[24] *See* Sur-Reply of North Pittsburgh Telephone Company, File No. EB-06-MD-004 (filed June 20, 2006) ("NPTC Sur-Reply") at 2. *See also* 47 C.F.R. § 76.1801 ("a system community unit shall be authorized to commence operation only after filing … FCC Form 322"). This was the only evidence that Salsgiver initially offered to NPTC to demonstrate that Salsgiver was operating a cable television system. Complaint at 6. We therefore find no fault with NPTC's rejection of that showing.

[25] Reply, Exh. 1 at § 3.2.

prospective pole attachers can rely on decisions by responsible regulatory agencies, such as franchise authorities in the case of cable system attachers, to establish a *prima facie* showing of their status as entities entitled to pole access under section 224(f) of the Act.[26] Furthermore, the Pole Attachment Agreement itself recognizes franchise agreements as relevant to assessing Salsgiver's status as a cable operator.[27]

9. NPTC nevertheless argues that the Freeport and Buffalo franchise agreements are inadequate to show that Salsgiver is a cable operator, because they do not obligate Salsgiver to initiate service at any particular time, or to serve specific areas "as cable franchises customarily require."[28] But NPTC provides no other agreements to demonstrate what is "customarily required,"[29] and offers only speculation that Salsgiver will not provide service under these franchise agreements. Thus, we find NPTC's argument inadequate to counter Salsgiver's *prima facie* showing.[30]

10. Aside from attacking the franchise agreements, NPTC questions Salsgiver's eligibility for pole attachment on four other bases. As explained below, we find none of those arguments sufficient to rebut Salsgiver's *prima facie* case.

11. NPTC first asserts that because Salsgiver has not yet constructed a cable headend, it is not yet eligible to attach to NPTC's poles as a cable operator. NPTC's primary support for this assertion is that the Pole Attachment Agreement between the parties allegedly requires Salsgiver to have a headend already in place.[31] We disagree, even assuming, *arguendo*, that such a contractual requirement would be reasonable under section 224 of the Act. The only portion of the Agreement that NPTC cites is Sheet 1 of Exhibit 1, "CATV System Application for Permit to Attach to NPTC Pole(s)."[32] This application form includes a field for identifying "CATV headend street address." Nothing, however, indicates that the application is invalid if there is no such address yet.[33] Moreover, a cable operator may have an address where it is building, or plans to build, a headend before the construction is complete. Thus, this field on the application form is not sufficient to create the substantive requirement that NPTC claims.

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[26] *Fiber Technologies Networks, LLC v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 3392, 3397, ¶ 15 (Enf. Bur. 2007) ("*Fiber Technologies*"); *DQE Communications Network Services, LLC v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 2112, 2116, ¶ 12 (Enf. Bur. 2007) ("*DQE Communications*"); *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (Enf. Bur. May 24, 2007) ("*Salsgiver*").

[27] Section 2.1 of the Agreement provides that pole attachments will be permitted only in areas for which Salsgiver has been granted a franchise by the applicable authority. Complaint, Exh. 8, § 2.1.

[28] NPTC Sur-Reply at 4-5.

[29] The single example of the Harrison Township Agreement, with its three-year buildout requirement, is insufficient evidence to establish an industry standard.

[30] *See Paragon Cable Television Inc. v. FCC*, 822 F.2d 152, 153-54 (D.C. Cir. 1987) (upholding Commission's decision to enforce pole attachment agreement's requirement that attacher have a local franchise, and to presume validity of franchising authority's action). *See also Fiber Technologies*, 22 FCC Rcd at 3395-98, ¶¶ 10-16; *DQE* Communications, 22 FCC Rcd at 2116-17, ¶¶ 10-13; *Salsgiver*, 22 FCC Rcd at 9281-9291, ¶¶ 9-12. NPTC also objects that the Harrison Township agreement post-dates the filing of the Complaint, and thus does not support Salsgiver's claim that it was a *bona fide* cable system operator in 2004 and 2005. Sur-Reply at 5. We agree, but note that the agreement does constitute a *prima facie* showing that Salsgiver is a cable operator in Harrison Township currently.

[31] Response at 17.

[32] *See* Response at 2, 17 (citing Sheet 1, Exh. 1 of the Pole Attachment Agreement, Complaint Exh. 8).

[33] *See* Reply at 9.

12. Second, although NPTC accuses Salsgiver of "gloss[ing] over" the issue of how it could be a cable television system within the meaning of Part 76 of the Commission's rules without a fully constructed headend,[34] NPTC offers no legal argument to suggest that Salsgiver cannot be. Rule 76.5 defines a cable system as "a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is *designed to* provide cable service." [35] Thus, rule 76.5 expressly contemplates that a network can qualify as a cable television system, even if it is still in the design phase and not yet fully operational, if it is intended to provide cable service. The fact that Salsgiver's headend has not yet been completed does not, in our view, disqualify Salsgiver from pole attachment rights as a cable television system.

13. Third, NPTC argues more generally that Salsgiver does not actually intend to provide cable services, but rather has "embarked upon a staged campaign to dress itself up as an entity entitled to access NPTC's poles."[36] NPTC suggests that Salsgiver actually intends to use NPTC's poles only to provide services not eligible for mandatory pole attachment, such as information services.[37] We find, however, that Salsgiver's obtaining franchise agreements constitutes a strong *prima facie* case that is not countered by mere speculation about Salsgiver's motives and intentions. As discussed above, the Harrison Township franchise requires Salsgiver to construct a cable system within three years. Moreover, the Agreement already addresses NPTC's concerns about whether Salsgiver will actually provide cable services via its attachments to NPTC's poles. Section 9.2 of the Agreement provides that Salsgiver's attachment rights will be deemed terminated if Salsgiver fails to initiate cable television service to a franchise area within one year after completion of make-ready work, or if Salsgiver ceases providing cable service in a franchise area.[38]

14. Finally, NPTC asserts that the franchise agreements "may not properly be considered part of Salsgiver's evidence of its claim that it is a bona fide 'cable television system,'" because the agreements were not filed with the Complaint.[39] We disagree. Rule 1.1409 permits the Commission to request additional filings or information from the parties in pole attachment cases, and the staff made such a request here for the franchise agreements.[40] NPTC was given an opportunity to respond, and was in no way unfairly prejudiced by the filing of this additional information.[41]

15. In sum, we find that Salsgiver has established a *prima facie* case, unrebutted by NPTC, that it operates a "cable television system" in Buffalo Township, the Borough of Freeport, and Harrison Township, Pennsylvania. Therefore, we hold that Salsgiver is entitled, under section 224 of the Act, to access NPTC's poles in these areas. We order NPTC immediately to provide Salsgiver with nondiscriminatory access to NPTC's poles in these areas, and promptly to process Salsgiver's attachment

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[34] Response at 17-18.

[35] 47 C.F.R. § 76.5 (emphasis added).

[36] Response at 1.

[37] *E.g.*, Opposition to Motion for Expedited Action, File No. EB-06-MD-004 (filed Apr. 3, 2006) ("Opposition to Motion"), at 1-4; Response at 1-3.

[38] Complaint, Exh. 8 at section 9.2. Similarly, under section 224(f) of the Act, if Salsgiver does not use its attachments to provide cable service (or telecommunications service), it will lose its statutory right to pole access.

[39] Sur-Reply at 2 (citing 47 C.F.R. § 1.1404(e)).

[40] 47 C.F.R. § 1.1409.

[41] Note, however, that had Salsgiver attached the franchise agreements to its initial Complaint, the pleading cycle in this case could have been more streamlined. Indeed, had Salsgiver provided the agreements to NPTC sooner, the parties' negotiations may well have been more fruitful.

applications submitted pursuant to the Pole Attachment Agreement.[42]

B. Salsgiver's Claims Regarding Rates, Terms, and Conditions of Attachment are Granted in Part and Denied in Part.

16. Salsgiver attacks numerous terms of the Pole Attachment Agreement as unjust, unreasonable, or discriminatory, in violation of section 224(b)(1) of the Act.[43] As discussed below, we conclude that Salsgiver has met its burden of proving that certain of the challenged provisions are unlawful. Salsgiver has failed, however, to meet its burden of proving that many other challenged provisions are unlawful.

1. The Pole Attachment Agreement Unreasonably Restricts Overlashing.

17. Section 3.2 of the Pole Attachment Agreement states that "Salsgiver is limited to one attachment per Licensor Pole and one installation per conduit, that attachment or installation is to include no more than one (1) cable…."[44] Salsgiver contends that, by limiting attachments to one cable per pole, the Agreement unreasonably prohibits Salsgiver from overlashing its own attachments.[45] We agree.[46] The Commission has a long-standing policy against unreasonable restrictions on overlashing, including restrictions on attachers' ability to overlash their own facilities.[47] The one-cable limitation does appear to ban Salsgiver from overlashing its own facilities, and NPTC does not argue otherwise.[48] NPTC also fails to provide any justification for the limitation. Thus, we find this blanket limitation to be unreasonable on its face, and direct NPTC to eliminate this restriction on overlashing within 60 days of the release of this order.

18. NPTC's only response is that Salsgiver did not raise this issue while the parties were negotiating the Pole Attachment Agreement.[49] NPTC raises this defense in response to a number of

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[42] We note that Salsgiver has not made a *prima facie* case as to other portions of NPTC's service area, nor has it challenged that portion of the Pole Attachment Agreement granting access only in those areas in which Salsgiver has been granted a cable franchise by the relevant authority. We expect that Salsgiver will provide NPTC with evidence of such franchises if Salsgiver seeks to attach to poles outside the areas specified above.

[43] 47 U.S.C. § 224(b)(1) (providing that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable").

[44] Complaint, Exh. 8 at 6.

[45] *See* Complaint at 19-20. Overlashing, whereby a service provider physically ties its wiring to other wiring already secured to the pole, is routinely used to accommodate additional strands of fiber or coaxial cable on existing pole attachments. *See, e.g.*, *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, 6805, ¶ 59 (1998) (subsequent history omitted) ("*Telecom Order*").

[46] Section 5.2.3. of the Agreement states that "Salsgiver may over-lash to its own attachments permitted under this Agreement." Complaint, Exh. 8 at 11. We cannot determine whether this provision overrides or otherwise affects section 3.2, as neither party has explained it. We thus must consider whether section 3.2 is reasonable standing alone.

[47] *See, e.g.*, *Telecom Order*, 13 FCC Rcd at 6805-10, ¶¶ 59-69 (citing *Common Carrier Bureau Cautions Owners of Utility* Poles, Public Notice, DA 95-35 (Jan. 11, 1995) (cautioning owners of utility poles against restricting cable operators from overlashing their own pole attachments)).

[48] NPTC says that section 3.2 "does not prohibit [Salsgiver] from overlashing onto third-party facilities," but does not respond to the contention that the provision prohibits Salsgiver from overlashing its *own* facilities. *See* Response at 25.

[49] Response at 24-25.

Salsgiver's other claims as well.[50] Failure to object to a pole attachment provision prior to its adoption, however, does not necessarily preclude a subsequent complaint, especially where, as here, the Agreement was challenged within several months of its adoption.[51] Thus, we reject NPTC's argument in connection with this and all other issues as to which it has been raised.

2. The Pole Attachment Agreement Unreasonably Restricts the Number of Salsgiver's Attachments.

19. Salsgiver complains that, independent of its effect on overlashing, the blanket prohibition on multiple attachments in section 3.2 of the Agreement is facially unreasonable, and that NPTC can deny access only on a case-by-case basis, and only when there is insufficient capacity, or for reasons of safety, reliability, or engineering concerns.[52] We agree, given that section 224 allows exceptions to attachment rights only for reasons of insufficient capacity, safety, reliability, and generally applicable engineering purposes.[53] NPTC offers no such justification for this limitation, noting only that Salsgiver did not raise the issue earlier, does not assert that it has requested multiple attachments, and does not prove that it needs multiple attachments.[54] Under the Act, none of these factors permits such a restriction. Therefore, we direct NPTC, within 60 days, to revise the Pole Attachment Agreement to eliminate this limitation.

3. The Pole Attachment Agreement Unlawfully Restricts Salsgiver's Use of "Boxing."

20. As previously indicated, the Act requires utilities to allow cable operators to make attachments to utility poles, allowing exceptions only "on a *non-discriminatory* basis where there is insufficient capacity and for reasons of safety, reliability and generally accepted engineering purposes."[55] Salsgiver asserts that section 3.2 of the Agreement violates the Act by imposing a discriminatory restriction on Salsgiver's attachments. Section 3.2 provides that "Salsgiver shall make all attachments on the same side of the Licensor Pole as Licensor has done . . . . Two-sided attachments are prohibited."[56] Salsgiver complains that this provision discriminatorily prohibits Salsgiver from engaging in the "commonly-accepted industry practice" of "boxing," the installation of facilities on both sides of a pole at approximately the same height.[57] Salsgiver asserts that NPTC itself uses boxing, and allows other attachers to do so as well.[58] NPTC does not actually deny this, but says that Salsgiver "does not aver facts to show that NPTC itself uses 'boxing.'"[59] In reply, however, Salsgiver offers photographic evidence of boxing on NPTC poles.[60]

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[50] *See* Response at 29-38.

[51] *See, e.g.*, *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co.*, Memorandum Opinion and Order, 17 FCC Rcd 25238, 25240-41, Phase I Order (Enf. Bur. 2002).

[52] Complaint at 20-21, ¶¶ 78-80 (citing 47 U.S.C. § 224(f)(2)).

[53] 47 U.S.C. § 224(f).

[54] Response at 25-26.

[55] 47 U.S.C. § 224(f) (emphasis added).

[56] Complaint, Exh. 7 at 6.

[57] Complaint at 21-22, ¶¶ 81-85

[58] Complaint at 22; Reply at 12-16.

[59] Response at 26.

[60] Reply at 19-21 and attached Salsgiver Declaration at 12-16.

21. Given the evidence that NPTC does allow boxing on some occasions, we find that the Agreement's blanket ban on Salsgiver's doing so is discriminatory and thus in violation of section 224 of the Act. Moreover, although NPTC states that "boxing creates an unnecessary safety hazard and/or encumbrance for NPTC lineman (sic) and technicians,"[61] that statement is unsupported by specific facts or analysis, and is undermined by the evidence of some boxing on NPTC's poles. Accordingly, we direct NPTC, within 60 days, to revise the Pole Attachment Agreement to eliminate this discriminatory provision.[62]

4. The Pole Attachment Agreement Unreasonably Requires Salsgiver to Incur Make-Ready Costs With No Assurance That Those Costs Will Be Reasonable.

22. Section 4.1.3 of the Agreement provides that Salsgiver's submission of a pole attachment application is deemed to constitute Salsgiver's agreement to pay for the cost of the Make-Ready survey. Under the Agreement, NPTC is not required to provide, nor is Salsgiver apparently permitted to demand, an estimate of those costs before Salsgiver is deemed to have agreed to pay them. We find this provision to be unreasonable on its face. NPTC argues that it is not unreasonable to charge Salsgiver for the cost of the survey.[63] We agree – the problem with this provision lies only in the fact that Salsgiver is committed to costs in an unspecified amount, with no opportunity to review them in advance.[64] We direct NPTC, within 60 days, to revise the Pole Attachment Agreement to provide Salsgiver an opportunity to review a cost estimate before incurring Make-Ready costs.

5. The Pole Attachment Agreement Unreasonably Requires That Third Parties Overlashing Salsgiver's Attachments Obtain A License From NPTC.

23. Section 5.2.3. of the Agreement prohibits Salsgiver from allowing any third party to overlash Salsgiver's attachments without obtaining a license to overlash from NPTC. Salsgiver argues that this provision is unreasonable on its face, and we agree. The Commission has made clear that "neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."[65] NPTC asserts that Salsgiver lacks standing to object on behalf of third parties.[66] Inasmuch as it is a provision of NPTC's agreement with *Salsgiver* that is at issue here, that position is meritless. We find this provision to be unreasonable on its face, and direct NPTC, within 60 days, to revise the Pole Attachment Agreement to eliminate the requirement that third party overlashers obtain their own licenses.

6. The Pole Attachment Agreement's 30-Day Application Requirement for Service Drops Is Unreasonable.

24. Salsgiver alleges that section 5.6 of the Agreement unreasonably requires an application,

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[61] Response at 27.

[62] Our decision here is limited to and by the record in this case. In some future adjudication or rulemaking, the Commission could, on the basis of a different record, decide to allow restrictions on boxing.

[63] Response at 28-29.

[64] *See Cable Texas, Inc. v. Entergy Services, Inc.*, Order, 14 FCC Rcd 6647, 6652 ¶ 14 (Cable Serv. Bur. 1999) (stating that pole owner must keep costs imposed on attacher reasonable).

[65] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, ¶ 75 (2001).

[66] Response at 28.

30 days in advance, before attaching or removing a service drop from NPTC's poles.[67] Salsgiver argues that it is entitled to make service drops on reasonable notice, and without prior approval. We agree, and find that section 5.6 is unreasonable on its face.

25. The former Cable Services Bureau, now Media Bureau, has previously stated that attachments to drop poles are adjuncts to attachments that are approved in the normal application process, and thus a utility may require notice, but not prior approval.[68] Salsgiver points out that a 30-day notice period would force the company to impose a 30-day waiting period on new service requests, and that such delays may be inconsistent with its franchises or other legal obligations.[69] NPTC fails to address the substance of Salsgiver's allegations, stating in a conclusory fashion only that Salsgiver "fail[s] to aver facts which would show that such notice in its 30 day requirement is discriminatory, unjust or unreasonable."[70] For the reasons stated by Salsgiver, we find the 30-day application requirement to be unreasonable, and direct NPTC, within 60 days, to revise the Pole Attachment Agreement to state a reasonable notice provision.

7. The Pole Attachment Agreement Provides Insufficient Notice For Removal of Salsgiver's Attachments.

26. Salsgiver challenges sections 5.9 and 9.3[71] of the Pole Attachment Agreement as providing inadequate notice for removal of Salsgiver's attachments.[72] Section 5.9 says that if NPTC decides to abandon, remove, or relocate a pole, Salsgiver's right to attach to that pole will terminate at the *earlier* of 60 days following the date of NPTC's notice to Salsgiver or the scheduled date of abandonment, removal, or relocation.[73] Section 9.3 states that if the Pole Attachment Agreement is terminated because of Salsgiver's noncompliance or default, NPTC may remove Salsgiver's attachments upon 30 days written notice.[74] Salsgiver alleges that these provisions conflict with the Commission's rules, which require utilities to provide *no less than* 60 days written notice prior to "removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the … pole attachment agreement."[75]

27. We agree that the challenged provisions, on their face, patently conflict with the plain

[67] Complaint at 28-30, ¶¶ 115-120; Complaint, Exh. 8 at 14 (section 5.6. provides that "installing or removing service connections shall not require prior authorization or notices, except that when a service drop is attached to or removed from a Licensor Pole, Salsgiver shall submit an Application at least 30 days prior to the attachment or removal"). A "service drop" is an adjunct line to the electric supply or communications main line. In cases where a service drop must cross a roadway, it is attached to a drop pole on the opposite side of the roadway. *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo*., Order, 15 FCC Rcd 11450, 11460, ¶ 19 (Cable Serv. Bur. 2000) ("*Mile Hi Bureau Order*"), *aff'd on review*, Order, 17 FCC Rcd 6268 (2002) ("*Mile Hi Commission Order*"), *review denied sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[68] *Mile Hi Bureau Order*, 15 FCC Rcd at 11460, ¶ 19. NPTC asserts that this decision is irrelevant because it concerns drop poles, not service drops. Response at 33. NPTC is incorrect – the decision addresses the issue of attaching service drops to drop poles. *Id.*

[69] Complaint at 29-30, ¶ 118, 120.

[70] Response at 33.

[71] The Complaint refers to section 9.2, but the language that Salsgiver quotes actually appears in section 9.3.

[72] Complaint at 31.

[73] Complaint, Exh. 8 at 16.

[74] Complaint, Exh. 8 at 25.

[75] 47 C.F.R. § 1.1403(c) (emphasis added).

language of our rules. NPTC's defense seems to be that the 60-day minimum notice provision of rule 1.1403 applies only if NPTC removes the attachments, not if it directs Salsgiver to remove them.[76] NPTC offers no rationale for making such a distinction, nor can we find one in the rule or its adopting order.[77] Moreover, such a distinction would make no sense. Accordingly, we direct NPTC, within 60 days, to amend the Pole Attachment Agreement to provide at least 60 days notice prior to removal of attachments.

8. The Pole Attachment Agreement Imposes an Unreasonable Penalty For Unauthorized Attachments.

28. Section 5.7.1 of the Agreement imposes a "penalty charge" of $250 for each unauthorized attachment, in addition to back attachment fees.[78] We agree with Salsgiver's contention that this penalty charge directly conflicts with Commission precedent.[79] The Commission has previously found unlawful a similar $250 "unauthorized attachment fee."[80] In *Mile Hi Cable Partners,* the Commission applied general contract principles prohibiting the enforcement of unreasonable penalties for breach of contract, and limited the utility to compensatory damages, where there was no specific record to support punitive damages.[81] Similarly, here we find that it would be unreasonable for NPTC to charge a $250 per attachment penalty, above and beyond compensatory damages, without a specific basis to justify such charges. NPTC asserts that the *Mile Hi Cable Partners* precedent is irrelevant, but offers no cogent basis for its assertion.[82] NPTC also fails to explain how the charge is anything but punitive. We therefore direct NPTC, within 60 days, to amend the Pole Attachment Agreement to limit the penalty for unauthorized attachments to compensatory damages, in accordance with *Mile Hi Cable Partners*.

9. Salsgiver's Other Facial Challenges to the Pole Attachment Agreement Are Denied.

29. Salsgiver's remaining claims are denied. Contrary to Salsgiver's allegations,[83] we find that sections 2.1, 5.2.1, 5.3, 6.1, 6.4, 6.7, 9.1, 9.2, and 9.5 of the Pole Attachment Agreement are not facially unlawful.[84] As to its claims regarding sections 2.6, 3.2, 5.11, 5.5.4, 6.2, 6.6, and 6.16 of the Pole

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[76] Response at 35.

[77] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16094-98 (1996) (subsequent history omitted).

[78] Complaint, Exh. 8 at 14-15.

[79] *See* Complaint at 31-31, ¶¶ 121-25.

[80] *Mile Hi Cable Commission Order*, 17 FCC Rcd at 6271-73.

[81] *Id.*

[82] Response at 34-35.

[83] *See* Complaint at 23-39, ¶¶ 89-102, 129-31, 137-41, 149-59.

[84] Section 2.1 does not, as Salsgiver asserts, apply to Salsgiver's attachments on other utilities' poles. Sections 5.2.1 and 6.1, dealing with space reservation, are not facially unreasonable because we presume that NPTC will comply with the guidelines for space reservation established by the Commission. Section 5.3 charges Salsgiver for safety inspections only if Salsgiver is found to be out of compliance with the Pole Attachment Agreement's Construction standards; this is not facially unlawful, and Salsgiver has not shown that NPTC will charge an unreasonable amount for such inspections. Section 6.4 does not, as Salsgiver claims, require Salsgiver to misrepresent the nature of its access rights. Section 6.7 does not, as Salsgiver claims, require Salsgiver to accede to requests from other utilities for make-ready work. Section 9.1, which permits either party to terminate the agreement without cause, but only with at least six months' notice, does not vitiate Salsgiver's attachment rights. Sections 9.1, 9.2 and 9.5 are not facially unlawful, inasmuch as they merely terminate Salsgiver's pole attachment rights if Salsgiver ceases to operate a cable television system.

Attachment Agreement,[85] Salsgiver has failed to meet its burden of proving the facts necessary to show that those provisions would be unlawful, as applied.[86] Salsgiver has also failed to meet its burden of proving that NPTC has imposed unlawful make-ready charges.[87] Finally, we deny as moot Salsgiver's claim that NPTC violated 47 C.F.R. § 1.1403(b) by failing to grant or deny Salsgiver's November 8, 2005 attachment application within 45 days,[88] inasmuch as we now grant the access that Salsgiver sought in that application.

III. ORDERING CLAUSES

30. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, and sections 1.1401-1.1408 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1408, that Salsgiver Communications, Inc.'s complaint is GRANTED to the extent that it requests immediate access to North Pittsburgh Telephone Company's poles located in Buffalo Township, the Borough of Freeport, and Harrison Township, Pennsylvania.

31. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, and sections 1.1401-1.1408 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1408, that the Complaint is GRANTED to the extent that we find above that certain provisions of the Pole Attachment Agreement are unlawful, and that NPTC SHALL, within 60 days from the release of this order, amend the Pole Attachment Agreement to eliminate or modify those terms that we have found unlawful.

32. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, and sections 1.1401-1.1408 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1408, that the Complaint is otherwise DENIED.

33. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the

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[85] *See* Complaint at 19-36, ¶¶ 73-74, 86-88, 103-20, 132-36, and 142-48.

[86] As to the confidentiality provision in section 2.6, Salsgiver has not explained why it must be permitted to divulge the terms of the Pole Attachment Agreement to others, simply so that Salsgiver may determine whether it is discriminatory. With respect to Section 3.2, Salsgiver has not shown how the requirement to obtain written agreement, "which agreement shall not be unreasonably withheld," constitutes an unreasonable burden on its right to attach to non-wooden poles. Salsgiver claims that section 5.11 discriminates between Salsgiver and other attachers, but provides no evidence of what other attachers are required to do. Salsgiver's complaint about sections 5.5.4 and 6.2 is merely speculative, and those provisions do not on their face suggest that NPTC will disregard its section 224 obligation to provide Salsgiver with nondiscriminatory access to rights of way. With respect to section 6.6, which gives NPTC the authority to bump unauthorized Salsgiver attachments off its poles in favor of a subsequent attacher, Salsgiver fails to provide any rationale for why its *unauthorized* attachments should be entitled to priority over other parties' *authorized* attachments. Salsgiver claims that under section 6.16, NPTC plans to charge for overhead and administrative costs that are already recovered in the annual rental rate, but offers inadequate evidence to prove this charge.

[87] *See* Complaint at 14-17, ¶¶ 51-66. Salsgiver provides no factual basis for its claim that NPTC has attempted to charge Salsgiver for remedying other parties' violations. As to the claim that NPTC's make-ready charges exceed prevailing market rates, Salsgiver has not provided sufficient evidence of comparative rates. And as to the claim that NPTC has charged for unnecessary make-ready work, Salsgiver does not respond to NPTC's justification for the charges, and thus we do not have sufficient basis to rule for Salsgiver at this time. We note, however, that costs not required to accommodate the attacher may not be imposed on the attacher. *See, e.g.*, *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999) (attacher responsible only for cost of work made necessary because of its attachments).

[88] *See* Complaint at 13-14, ¶¶ 47-50.

Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, and sections 1.1401-1.1408 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1408, that Salsgiver's Motion for Expedited Action and to Bifurcate Complaint[89] is DENIED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief, Enforcement Bureau

[89] Motion for Expedited Action and to Bifurcate Complaint, File No. EB-06-MD-004 (filed Mar. 20, 2006).